No. 8378.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

10

THE EAGLE, STAR AND BRITISH DOMINIONS, a British corporation,

Complainant,

vs.

M. G. TADLOCK, SECURITY TRUST & SAVINGS BANK OF SAN DIEGO, a corporation, MATT J. WALSH and FRANK E. GARBUTT, doing business under the firm name and style of GARBUTT-WALSH, a co-partnership, J. J. CAMILLO, HARBOR BOAT BUILDING COMPANY, a corporation, DAVID C. CAMPBELL and GEORGE E. CAMPBELL, doing business under the firm name and style of THE CAMPBELL MACHINE CO., a corporation,

Defendants.

MATT J. WALSH and FRANK E. GARBUTT, doing business under the firm name and style of GARBUTT-WALSH,

Cross-Complainants,

vs.

M. G. TADLOCK, SECURITY TRUST & SAVINGS BANK OF SAN DIEGO, a corporation, J. J. CAMILLO, HARBOR BOAT BUILDING COMPANY, a corporation, DAVID C. CAMPBELL and GEORGE E. CAMPBELL, doing business under the firm name and style of THE CAMPBELL MACHINE CO., a co-partnership,

Cross-Respondents.

SECURITY TRUST & SAVINGS BANK OF SAN DIEGO, a corporation, and M. G. TADLOCK,

Appellants,

vs.

MATT J. WALSH and FRANK E. GARBUTT, doing business under the firm name and style of GARBUTT-WALSH,

Appellees.

APPELLEES' BRIEF.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

LLOYD S. NIX,
436 Title Insurance Bldg., Los Angeles,
Solicitor for Appellees.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

STATEMENT OF THE CASE.

The Statement of the Case as presented in Appellants' Brief is controverted by the appellees and the following statement is therefore submitted.

On February 13, 1936, Talbot Bird & Co., Inc., a California corporation, United States Marine Managers for The Eagle, Star and British Dominions, a British corporation, countersigned, issued and delivered at San Francisco, Calfornia, a certain policy of marine insurance upon the Diesel Vessel "YELLOWTAIL", wherein and whereby said British corporation insured one M. G. Tadlock and undertook to pay to said assured, and/or Security Trust & Savings Bank of San Diego, and/or Garbutt & Walsh, a copartnership, as their respective interests may appear, or order, the sum of $8,000 in the event the vessel should become a total loss.

On February 22, 1936, said Diesel Vessel "YELLOWTAIL" caught fire, burned and sank at sea and became a total loss owing to perils insured against in said policy.

On March 16, 1936, the appellees herein, Matt J. Walsh and Frank E. Garbutt, doing business under the firm name and style of Garbutt-Walsh, filed a libel in personam in the District Court of the United States for the Southern District of California, Central Division, in a cause of marine insurance, the respondents therein being the insurer, The Eagle, Star and British Dominions, a British corporation, Talbot Bird & Co., Inc., a California corporation, its agent and United States Marine Manager, and the other parties named in said insurance policy, namely, M. G. Tadlock and Security Trust & Savings Bank of San Diego, a corporation.

On April 3, 1936, The Eagle, Star and British Dominions, a British corporation, filed its complaint in interpleader [Tr. pp. 6-13, incl.] in said District Court, alleging the execution and delivery of the policy of marine insurance above mentioned, the loss of the vessel owing to perils insured against in said policy; and further alleging that thereupon there became payable, according to the terms of the policy the sum of $7,160, being the face amount of the policy ($8,000) less unpaid premium of $840, that each of the respondents had made demand upon the complainant for all or some portion of said sum of $7,160, to which fund the complainant disclaimed any interest, and that certain of the respondents had commenced action and levied attachment against the complainant and others had threatened to do so. The complaint in paragraphs I to VII, inclusive, alleges diversity of citizenship between the complainant, a citizen and resident of the Kingdom of Great Britain, and the respondents, all citizens and residents of the State of California. Paragraph VIII alleges that the court has jurisdiction of the controversy under subdivision 26 of section 41, title 28 of the United States Code (being the so-called Federal Interpleader Statute) and also under the general equity jurisdiction by reason of diversity of citizenship and alienage of parties. Complainant paid the said sum of $7,160 into the registry and prayed that the respondents be ordered, adjudged and decreed to interplead and settle between themselves their rights in or claims to the proceeds of said policy, that it be released from all claims and demands of respondents, for its costs and attorneys' fees to be paid out of said sum, and that respondents be enjoined and restrained from prosecuting any action at law or suit in equity or libel in admiralty against com-

plainant arising out of or incident to said policy of insurance, and for a temporary restraining order.

Order to show cause and temporary restraining order thereupon issued returnable April 13, 1936, and was served upon the several respondents. The respondents Security Trust & Savings Bank of San Diego, a corporation, and M. G. Tadlock, each filed an answer to the complaint in interpleader [Tr. pp. 24-45, incl.] and [Tr. pp. 14-23, incl.] wherein the jurisdiction of the court was admitted. Said Security Trust & Savings Bank of San Diego also filed a cross-complaint or bill against the complainant and the other respondents. [Tr. pp. 46-53, incl.]

At the hearing on April 13, 1936, upon said order to show cause the respondents Garbutt-Walsh, appellees herein, appeared specially and objected to the jurisdiction, contending that exclusive jurisdiction in admiralty had attached prior to the commencement of the suit in interpleader and that the equity court was without jurisdiction. The matter was taken under submission and opinion rendered by the District Judge [Tr. pp. 54-71, incl.]. A motion to dismiss the complaint in interpleader and for an order that the funds in the registry be not withdrawn but be held pending the determination and disposition of the claim of Garbutt-Walsh as libelants in the admiralty cause [Tr. pp. 72-73] was noticed for hearing on May 11, 1936. On that day the solicitor for the complainant, The Eagle, Star and British Dominions, appeared in court, but none of the respondents except Garbutt-Walsh appeared. No hearing was had upon the motion, the respondents Garbutt-Walsh in open court withdrawing their objections and stipulating that interlocutory decree [Tr. pp. 74-77] might be

signed and entered. Said decree permanently and perpetually enjoined and restrained each and all of the respondents from instituting or prosecuting or continuing to prosecute any action at law or suit in equity or libel in admiralty in any court in any jurisdiction against the complainant arising out of or incident to the policy of insurance referred to in the complaint or on account of the matters and things set forth in the complaint; ordered that each and all of the defendants, appearing in said cause and against whom no order of default had been entered, appear or plead on or before twenty days from date of the decree; that the complainant be awarded its costs taxed in the sum of $57.88 and solicitors' or attorneys' fees amounting to $500, which the court found to be just and reasonable to be paid out and deducted from the sum of $7,160; and that the remainder, or balance of said sum, be retained by the clerk of the court, to be distributed to the defendants, as their interests might thereafter appear, and be established by final decree, and any balance thereof, if any there be, paid over and delivered to complainant. [Tr. pp. 76-77.]

Thereafter on May 28, 1936, pursuant to said decree, the respondents Garbutt-Walsh filed their answer to the cross-complaint or bill of Security Trust & Savings Bank of San Diego [Tr. pp. 78-84, incl.], and at the same time filed a cross-bill against the appellants herein, M. G. Tadlock and Security Trust & Savings Bank of San Diego, a corporation, and the other respondents named in the complaint in interpleader. [Tr. pp. 86-95, incl.] Said answer and cross-bill were served on the attorneys of record for the several cross-respondents on May 28, 1936, service upon the attorneys for the appellants herein being made by mail and affidavit of such

service having been filed on June 3, 1936. [Tr. pp. 96-98, incl.] No answer to said cross-bill having been filed by any of the cross-respondents, on the 12th day of June, 1936, the solicitor for cross-complainants Garbutt-Walsh filed a motion that the default of all cross-respondents be entered [Tr. p. 99] and on said day the court made an order that said cross-bill be taken as confessed. [Tr. p. 100.]

On said 12th day of June, 1936, said cross-complainants Garbutt-Walsh appeared before the Honorable District Judge, Leon R. Yankwich, hearing was had upon said cross-bill and evidence, both oral and documentary, submitted in support thereof, and thereupon the court made and filed its findings of fact and conclusions of law [Tr. pp. 101-106, incl.] and its decree was entered and recorded on said 12th day of June, 1936, that the cross-complainants Matt J. Walsh and Frank E. Garbutt, doing business under the firm name and style of Garbutt-Walsh, do have and recover and receive from the proceeds of marine insurance policy No. PC 59564, on deposit in the registry of said court, the sum of $4,358.06, together with interest thereon at the rate of 7% per annum from January 31, 1936, amounting to the sum of $210.90, and their costs taxed in the sum of $42, including solicitors' fees, that the clerk of said court make disbursements forthwith in accordance with said decree, and that the maritime claim, lien and interest of said cross-complaints be, and was thereby, declared and adjudged to be prior and superior to the claims of each and all of the cross-respondents, *viz.*: M. G. Tadlock, Security Trust & Savings Bank of San Diego, a corporation, J. J. Camillo, Harbor Boat Building Co., a corporation, David C. Campbell and George E. Campbell, doing business under the firm name

and style of The Campbell Machine Co., a co-partnership, and that the claims of each and all of said cross-respondents be, and were thereby, declared and adjudged to be subsequent, subordinate and inferior to that of said cross-complainants. [Tr. pp. 107-109, incl.]

Thereafter on the 16th day of June, 1936, a purported answer to said cross-bill by the cross-respondent and appellant Security Trust & Savings Bank of San Diego was received by the clerk of the District Court for filing [Tr. pp. 110-152, incl.] and thereafter on the 18th day of June, 1936, an answer of cross-respondent and appellant Tadlock was received by the clerk. [Tr. pp. 153-162, incl.]

Thereafter on the 22nd day of June, 1936, said cross-respondents filed a motion for an order setting aside the default of said cross-respondents to the cross-bill of Garbutt-Walsh, theretofore entered on Friday, June 12, 1936, and for setting aside any order of the court made and entered in favor of said cross-complainants by reason of said default, upon the ground that said default was caused by inadvertence and excusable neglect of counsel representing said cross-respondents and upon the further ground that unless said default and order based thereon be set aside and the answers of said cross-respondents permitted to stand, equity and justice cannot be had between the parties to said action and cause and each of said cross-respondents will suffer loss because of inadvertence and excusable neglect on the part of their counsel. [Tr. pp. 163-164, incl.] Notice of said motion was given, and filed on said June 22, 1936 [Tr. pp. 165-166], and affidavits of J. F. DePaul and Shelley J. Higgins in support of said motion were also filed. [Tr. pp. 167-175, incl.] On June 29, 1936, counter-affidavit of Lloyd S. Nix

in opposition to said motion setting forth that default was taken on June 12, 1936, pursuant to Equity Rule 31, the cause thereafter came on for hearing, was heard by the court, evidence both oral and documentary introduced, findings of fact and conclusions of law duly made and filed, and the decree of the court thereon entered, that costs were taxed in favor of cross-complainants and against cross-respondents in the sum of $42 and the amount awarded cross-complainants by said decree paid out of the registry of the court in accordance therewith; that the envelopes in which the respective proposed answers of cross-respondents Tadlock and Security Trust & Savings Bank were forwarded to said affiant were postmarked at San Diego, California, June 17, 1936, 6 p. m. and June 15, 1936, 6 p. m., respectively, and that neither of said answers presented a meritorious defense to the cross-bill and, if allowed to be filed, would be subject to motions to strike. [Tr. pp. 176-177.]

Said motion came on for hearing before the Honorable District Judge Leon R. Yankwich on the 29th day of June, 1936, argument was had thereon, and the matter taken under submission. On July 1, 1936, said court made its order that the motion of said cross-respondents be denied. [Tr. p. 178.]

On September 8, 1936, said cross-respondents filed in the District Court their petition for appeal from said order of July 1, 1936, denying their motion and from the decree made and entered by the court on June 12, 1936, with a prayer for severance [Tr. pp. 185-186], together with assignments of errors. [Tr. pp. 187-189, incl.] An order allowing appeal and severance was made and entered on September 14, 1936. [Tr. pp. 190-191.]

ARGUMENT.

The Court Committed No Error in Denying the Motion to Set Aside the Default of Appellants and Decree Based Thereon.

The alleged errors of law assigned by appellants [Tr. pp. 187-189, incl.] are vague and general. It is impossible to determine which of the assignments are relied upon from the specification of errors appearing in appellants' brief at page 7. It is respectfully submitted that the assignments do not set out separately and particularly each error as required by rule 11 of this court. In order to comply with the rule the assignment must be sufficiently specific so that the understanding and attention of the court is at once arrested without being forced to search the record to determine what the issue is.

> *Simkins Federal Practice,* Revised Edition Sec. 283, p. 198, and cases cited.

Much of the appellants' argument is concerned with a proposition not mentioned in the assignment of errors, namely, that the default was due to the excusable neglect and inadvertence of solicitors and not appellants.

Counsel for appellants do not question the fact that the answers sought to be interposed by them were received by the clerk too late to comply with rule 31 of the Equity Rules requiring that an answer to a set-off or counterclaim be made within ten days, but urged upon their motion and now urge that, because of the unfamiliarity of such counsel with the practice in the federal courts, the default should be set aside.

In none of the cases cited by appellants was a decree entered after default and hearing by the court reversed

upon appeal. The Supreme Court has repeatedly declared that it will not reverse a chancery decree for departures from technical rules when it can see that no harm resulted.

Allis v. Ins. Co., 97 U. S. 144, 24 L. ed. 1008;

Hornbuckle v. Stafford, 4 S. Ct. 515, 111 U. S. 389, 28 L. ed. 468.

Appellants were not entitled to have the decree set aside by reason of the fact that it was entered on the same day as the order for entry of default. The trial court did not abuse its discretion in this regard.

Findings were made and conclusions drawn therefrom [Tr. pp. 101-106, incl.] after hearing by the court, testimony of witnesses Grace Ailman and Matt J. Walsh having been introduced on behalf of cross-complainants.

Miss Ailman testified as follows:

Direct examination by Mr. Nix:

[Rep. Tr. p. 2, lines 10 to 26]:

"Q. Miss Ailman, where do you reside? A. I live at Long Beach.

Q. You are employed by the firm of Garbutt & Walsh? A. Yes.

Q. How long have you been in their employ? A. Almost 14 years.

Q. 14 years. And what are your duties? A. I am the bookkeeper.

Q. You are the bookkeeper; and as such, you have charge of all the books of account of Garbutt & Walsh? A. Yes.

Q. Just state to the court the procedure—the reason for this, these books are just a little out of the ordinary.

The Court: That is all right.

Q. By Mr. Nix (continuing) —with reference to the tabulation of the work done on the boat by the

[Rep. Tr. p. 3, lines 1 to 26]:

carpenters, I will show you the time slips. A. Yes; those are the time slips.

Q. And they have to do—I will hand them to you—they have to do with reference to all of the work and labor performed on the boat "Yellowtail" and the materials furnished the boat "Yellowtail"? A. Yes.

Q. And that is the boat, and you are familiar with the boat "Yellowtail," being owned by one M. G. Tadlock, or was owned prior to the fire by one M. G. Tadlock? A. Yes.

Q. You check the time cards daily and make entries in your books of account? A. Yes.

Q. I will show you here some sheets. Will you testify to the court what the sheets are? A. These are an itemized statement of the labor performed and the materials used on the boat "Yellowtail."

Q. And those sheets that are in your possession now are parts of the general books of account? A. Yes.

Q. The leaves taken out of your general books of account? A. Yes.

Q. On the boat "Yellowtail"? A. Yes.

[Rep. Tr. p. 4, lines 1 to 26]:

Q. And you have personally compared the sheets and your books of account with the statement that I am handing you herewith? A. Yes.

Q. And it carries a complete statement of the books of account on the boat "Yellowtail"? A. Yes; it is a copy.

Mr. Nix: It is a copy. First, I will introduce the books of account and ask permission to substitute the copy as compared by the bookkeeper.

The Court: The copy will be substituted in lieu of the original and the statement of account dated January 31, and the accompanying proofs, identified by the witness as the copies of the original books of account made and prepared by her will be received as—you are the claimant or the libelant?

Mr. Nix: We are the cross-complainants, Your Honor.

The Court: Cross-complainant.

Mr. Nix: Cross-complainant, Garbutt & Walsh.

The Court: No, you are—

Mr. Nix: Yes; the cross-complainants in this case.

The Court: Oh, is this the cross-complaint?

Mr. Nix: Yes; this is the equity proceeding, you see.

The Court: Oh, yes. All right. Cross-complainant's 1.

Q. By Mr. Nix: Your books of account show [Rep. Tr. p. 5, lines 1 to 26]:
that there was due from the boat "Yellowtail" and owners the sum of $4,858.06? A. Yes.

Q. And no part thereof has been paid with the exception of $500? A. That is right.

The Court: Now, let us see; in which are we making this proof, in the admiralty case?

Mr. Nix: In the equity case.

The Court: Oh, in the equity case, the interpleader case.

Mr. Nix: Equity in the interpleader, Your Honor.

The Court: That is 886-Y?

Mr. Nix: That is 886-Y, Your Honor; that is right.

The Court: That is right. Did we ever make an order consolidating the two?

Mr. Nix: No; no order was ever made.

The Court: What did you do with the other one where you had a claim against Tadlock, the original action you brought which was afterwards embodied in your cross-complaint? Has that been dismissed?

Mr. Nix: That will be dismissed; yes.

The Court: That is all right. Some disposition should be made of it.

Mr. Nix: Yes. As a matter of fact, I will make a motion that that be dismissed.

[Rep. Tr. p. 6, lines 1 to 9]:

The Court: All right. Have you the number? Dismissal will be entered in the cause entitled "M. J. Walsh and Frank G. Garbutt vs. Tadlock."

Mr. Nix: Without prejudice?

The Court: Without prejudice, on the ground that the cross-complaint in the action now being tried embodies the same cause of action.

Mr. Nix: Yes. That is all, Miss Ailman. Will you take the stand, please, Mr. Walsh?"

Photostatic copy of the insurance policy attached to plaintiff's complaint in interpleader was offered and received by reference as Cross-complainant's Exhibit 2.

Matt J. Walsh, a cross-complainant, upon direct examination by Mr. Nix, testified as follows:

[Rep. Tr. p. 7, lines 23 to 26]:

"Q. Your name is Matt J. Walsh? A. Yes, sir.

Q. And you are the Walsh, as noted in the cross-[Rep. Tr. p. 8, lines 1 to 26]:
complaint, and one of the partners of Garbutt & Walsh? A. Yes, sir.

Q. And your business is what, Mr. Walsh? A. Boat building and repairing.

Q. And the firm of Garbutt & Walsh is the same firm as named in the insurance policy just referred to and marked Cross-complainants' Exhibit No. 2? A. Yes, sir.

Q. Now, Mr. Walsh, you performed certain labor and did certain repairing on the boat "Yellowtail" owned by M. G. Tadlock? A. Yes, sir.

Q. You heard the testimony of Miss Ailman on the witness stand, wherein she stated that the total amount of the bill against the boat "Yellowtail" was the sum of $4,858.06? A. Yes, sir.

Q. And no part of that has been paid, with the exception of the $400, as set forth in your books of account? A. Four or five hundred.

Q. Mr. Walsh, do you remember who was master of the boat "Yellowtail" in December of 1935? A. Clyde Tadlock.

Q. Did you have a conversation with Clyde Tadlock with reference to the repairing of the boat "Yellowtail"? A. Yes, sir.

[Rep. Tr. p. 9, lines 1 to 26]:

Q. Please state to the court your conversation, the conversation you had with Mr. Tadlock with reference to the repairing of the boat "Yellowtail." A. Well, Your Honor, they brought her up and had her put on the ways and the crew and himself tore off the pilot-house and a good portion of the deck, and then he come to me and he said that he wanted

a new pilot-house on, and a refrigerator plant put in and the boat generally gone over. So I called Mr. Nix to come down from Los Angeles and told him, that inasmuch as he must owe the bank considerable at San Diego, we would call them up and let them know what was going on. So we got hold of Mr. Sutherland, I believe, below, and he said that those folks were honest and they had done quite a lot of business with them. Inasmuch as we were giving them credit, why, there was nothing to do but go ahead and let us all get our money out of it. So Mr. Nix got on the phone at that time, or I turned the telephone over to him to verify it. After he got through talking to him he said, "We are sanctioned to go ahead." I wanted Mr. Tadlock, who was standing outside on the ways, to come in and verify it so they would know he was listening to the conversation, so we proceeded on that. Mr. Tadlock O. K'd the bill.

Q. And Mr. Tadlock worked on the boat? A. He was in supervising the work.

Q. And was there every day and ordered all of [Rep. Tr. p. 10, lines 1 to 26]:
the work done? A. Yes, sir.

Q. And you were present, were you, Mr. Walsh, when I telephoned to the bank at San Diego to one Mr. Sutherland? A. Yes, sir. I handed you the phone.

Q. And you stated that you called Mr. Tadlock? A. Yes, sir.

Q. The master of the boat? A. Yes, sir.

Q. And Mr. Tadlock had complete charge of that boat, did he not, Mr. Walsh? A. Yes, sir. If you will permit me—

Mr. Nix: Surely.

A. If you will permit me, your Honor, I told him that any of the men we put on there, if they didn't satisfy him as to the quality or quantity of work, all he had to do was say so. He said there was only one man that he had any objection to and that man's work was so nice, the fitting, that he couldn't afford to let him go.

Q. Mr. Walsh, the account as set forth is a reasonable charge to be made in such cases for the repair of the boat "Yellowtail"? A. That is the regular charge used all over the port for that class of work.

Q. And that regular charge is a reasonable charge? A. Yes, sir.

[Rep. Tr. p. 11, lines 1 to 26]:

Q. By the Court: You did not have any definite understanding as to how much money it would cost? A. No. It was a time and material job, and there are often things come up that you don't see at the time.

The Court: I see.

Q. By Mr. Nix: And all of the workmen on the boat were under the direct supervision of Mr. Tadlock, the captain? A. Direct. They took orders from him.

Q. It was necessary, was it not, Mr. Walsh, to make these repairs so that the boat could operate in her regular course? A. Absolutely necessary.

Q. By the Court: What is the total amount?

Mr. Nix: The total amount now is $4,358.06, and I have computed the interest.

The Court: That is all right. I mean the total amount here.

Mr. Nix: The total, $4,858.06.

Q. By the Court: Is that the reasonable amount? A. That is a reasonable amount, your Honor.

Q. None of this has ever been paid? A. None of it.

Q. How long before the boat was lost was this service rendered? A. About five or six weeks afterward, or four weeks.

[Rep. Tr. p. 12, lines 1 to 26]:

Mr. Nix: She was lost while fishing on February 22, 1936.

The Witness: Coming home with a load of fish.

The Court: What? A. Coming home with a load of fish.

The Court: All right.

Mr. Nix: That is all, Mr. Walsh. If the court desires, I would be very happy to testify with reference to my conversation with Mr. Sutherland and as to my conversation with Mr. Tadlock in this matter, if the court desires further information.

The Court: No, unless there is a question of waiver of priority.

Mr. Nix: No; there isn't a question.

The Court: No question of priority of lien because this is a maritime lien.

Mr. Nix: That is right.

The Court: For repairs necessary on the boat?

Mr. Nix: That is right.

The Court: Therefore, priority is not involved.

Mr. Nix: Yes; and, as Mr. Walsh stated on the stand, it was just a matter of courtesy that I asked Mr. Walsh to call the representatives in San Diego and give them an opportunity to come up and object if they wanted to, just a matter of courtesy.

The Court: All right. The judgment, upon proof, [Rep. Tr. p. 13, lines 1 to 26]:
after default, will be entered in the sum of $4,358.06 in favor of Matt J. Walsh and Frank E. Garbutt, doing business under the firm name and style of Garbutt & Walsh, a co-partnership, with interest.

Mr. Nix: With interest from January 31, 1936. I tabulated that at two hundred and—that was the date of the completion.

The Court: Of the completion.

Mr. Nix: Yes.

The Court: Is there any trade allowance?

Mr. Nix: The allowance was $400, paid on December 24th and $100 on January 8th, so we are giving them the benefit of some quite a few days in there.

The Court: I mean there is no usual trade allowance there of 60 days?

Mr. Nix: Oh, no; no trade allowance.

The Court: All right.

Mr. Nix: $210.90.

The Court: What did you figure as the interest?

Mr. Nix: $210.90.

The Court: I think in my question to Mr. Walsh I made a mistake in asking whether the sum of $4,358.06 was reasonable. I should have asked him whether the sum of $4,858.06 was reasonable, and I think there is an error in the record according to this. There had been two payments, one cash payment of $400 on December 24, 1935, and one on [Rep. Tr. p. 14, lines 1 to 6]:
January 8, 1936, of $100. Is that correct, Mr. Walsh?

Mr. Walsh: Yes.

> The Court: That reduces the total to $4,358.06, and interest to date is computed at $210.90. Judgment will be entered on the money and the registry order applied to the satisfaction of the debt."

Findings based upon testimony taken in open court are presumptively correct and must be affirmed

> *Ott v. Thurston* (C. C. A. 9, 1935), 76 Fed. (2) 368,

and will not be disturbed save for obvious error or serious mistake of fact.

> *Neece v. Durst,* 61 Fed. (2d) 591, 593 (C. C. A. 9);
>
> *Swift v. Higgins,* 72 Fed. (2d) 791, 796 (C. C. A. 9);
>
> *Exchange National Bank v. Meikle,* 61 Fed. (2d) 176, 179 (C. C. A. 9).

Mistake of counsel alone is insufficient as a basis for holding that the lower court abused its discretion in denying the motion to set aside default.

The moving party must show cause for vacating the decree, which cause involves an excuse for the default and injury to the applicant, which latter involves a meritorious defense of which he will be deprived if the decree is not opened.

> *Equity Rule 17;*
>
> 21 *Corpus Juris,* p. 809, sec. 958.

No attempt has been made to comply with the further provisions of Rule 17 as to costs. Counsel make no attack upon the findings of the lower court, but rather urge

that a meritorious defense was presented by the answers proposed to be filed.

The contention is advanced by appellants that cross-complainants could have no lien upon the vessel or interest in the proceeds of the insurance policy by reason of the following provision in the mortgage held by appellant Bank:

> "But if default be made in such payments, * * * or if said first party shall suffer and permit said vessel to be run in debt to an amount exceeding in the aggregate the sum of No.....dollars, * * * said party of the second part is hereby authorized to take possession of said goods, chattels, and personal property at any time, wherever found, either before or after the expiration of the time aforesaid, and to sell and convey the same, or so much thereof as may be necessary to satisfy the said debt, interest and reasonable expenses, * * *." [Tr. p. 41.]

The mortgage held by appellant Bank is not a preferred mortgage under the Ship Mortgage Act (46 U. S. C. A. sec. 911 *et seq.*), since a mortgage is made preferred only upon compliance with all the conditions specified in that act. In the case of *Morse Dry Dock & Repair Co. v. S. S. "Northern Star"*, 271 U. S. 552, 46 S Ct. 589, 70 L. ed. 1028, it was held that under Subsection D of the Ship Mortgage Act, a lien for repairs has prority over an existing mortgage which has not been indorsed on the ship's papers as required by that act, notwithstanding the mortgage contains a covenant binding the mortgagor not to suffer or permit any lien which might have priority over the mortgage.

The cases cited by appellants in support of their argument that appellees acquired no lien against the vessel and consequently no interest in the proceeds of the insurance policy are cases in which the vessels were under charter and the furnishers had actual knowledge of or were charged with notice of terms requiring the charterer to pay all expenses. In the present case the work was done under the supervision of the master of the boat, who approved the bills. The charges made were the regular charges used all over the port for that class of work and were reasonable. Furthermore, the repairs were made with the knowledge and consent of the appellant Bank.

The mere fact that there is a mortgage, and not a preferred mortgage, upon a ship, does not in the least prevent or limit the right of her owner, or that owner's lawful agents, to pledge the credit of the vessel by the incurring of a maritime lien. This is because the maritime lien is superior to the mortgage and takes no cognizance of the mortgage as such.

The Buckhannon (C. C. A. N. Y. 1924), 299 Fed. 519;

The Easby (D. C. Md. 1912), 201 Fed. 585.

Under Subsection Q of the Ship Mortgage Act (45 U. S. C. A. sec. 972), certain persons, including the master and any person to whom the management of the vessel at the port of supply is intrusted, are presumed to have authority to procure repairs, etc., and to bind the vessel.

The Luddco 41, 66 Fed. (2d) 997 (C. C. A. 9, 1934).

The maritime lien is a property interest or right in the vessel itself and not a cause of action or demand for a personal judgment against its owner.

> *The Theodore Roosevelt* (D. C. Ohio 1923), 291 Fed. 453, petition dismissed (C. C. A. 1926) 10 Fed. (2d) 15, Cert. denied (1926) 46 S. Ct. 488, 271 U. S. 674, 70 L. ed. 1145.

It is a special property right in the ship given to the creditor by law as security for the debt or claim, subsisting from the moment the debt arises.

> *The Poznan* (C. C. A. 1925 N. Y.), 9 Fed. (2d) 838, reversed on other grounds 1927, 47 S. Ct. 482, 274 U. S. 117, 71 L. ed. 955.

The allegations contained in the answers proposed to be filed are not supported by the terms of the mortgage, a copy of which is attached to the proposed answer of appellant Bank. There is no express covenant prohibiting the owner and mortgagor from suffering or permitting any debts to be incurred by said vessel. That a lien creditor has an insurable interest in the vessel is conceded by appellants (Open. Brief pp. 31-32), and is supported by the authorities.

> *Ins. Co. v. Baring,* 20 Wall. 163, 22 L. ed. 252.

In equity liens given by the maritime law are respected and enforced precisely as in a court of admiralty. Admiralty jurisdiction of the federal courts under the United States Constitution and laws is uniform through-

out the Union and cannot be limited in its extent or controlled in its exercise by the laws of the several states.

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. ed. 834;

Washburn & M. Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 21 S. Ct. 1, 45 L. ed. 49, 58.

It is respectfully submitted that neither of the proposed answers presents a meritorious defense to the cross-bill and that there was no error in refusing to set aside the default.

In the case of *Koen v. Beardsley,* 63 Fed. (2d) 595, (cited by appellants in their brief at page 15), the trial court's refusal to vacate a decree based on an order *pro confesso* on defendant's cross-bill was not disturbed on appeal, where plaintiff failed to present meritorious defense to a counterclaim, so that it could not be said that a different final result would be reached. The court in that case, at page 597, said:

> "There was no compliance with the terms imposed by Rule 17. A conclusive ground for our refusal to revise the action of the trial court is that the plaintiff wholly failed to present a meritorious defense to the counterclaim. In the absence of that showing, it cannot be said that a different final result would be reached, and for that reason the decree should not be disturbed. Manville & Co. v. Francis O. & R. Co. (C. C. A.) 20 F. (2d) 473; Lane v. Shelby Shoe Co. (C. C. A.) 45 F. (2d) 581; Christy v. Atchison, T. & S. F. R. Co. (D. C.) 214 F. 1016; Mobile Shipbuilding Co. v. Federal Bridge & Structural Co. (C. C. A.), 280 F. 292; White v. Crow *et al.,* 110 U. S. 183, 4. S. Ct. 71, 28 L. ed. 113; Schofield v. Horse Springs Cattle Co. (C. C.), 65 F. 433; 34 C. J. p. 329."

The Court Had Jurisdiction of Original Bill by Reason of Diversity of Citizenship and Alienage of the Parties and Has Jurisdiction Over Parties to Cross-Bill.

As a final point under the first specification of error, it is asserted that it appeared on the face of the cross-bill that the controversy existed between citizens of the same state and therefore the court was without jurisdiction of the subject matter of the cross-bill which appellants failed to answer within ten days. The complainant in the original bill in interpleader was a British corporation, the respondents all residents and citizens of California.

In their answers to the original bill in interpleader, appellants admitted the jurisdiction of the court [Tr. pp. 15-16, 25-26], and they made no objection to the entry of interlocutory decree herein.

By express constitutional provision the federal judicial power extends to controversies between a state, or the citizens thereof, and foreign states, citizens or subjects and by a statute jurisdiction is conferred upon the district courts of suits between citizens of a state and foreign states, citizens or subjects.

25 *Corpus Juris,* sec. 57, p. 745.

Suits for interpleader were familiar to equity when the Constitution was adopted.

Spring v. South Carolina Ins. Co., 8 Wheat. 268, 5 L. ed. 614.

In the complaint in interpleader herein jurisdiction under the Federal Interpleader Act and under the general equity jurisdiction was averred [Tr. p. 8]. In the opinion of the District Judge herein, quoted at length in appellants' brief(pp. 41-55), the following sentence in the last paragraph disposes of the question of jurisdiction apart from the statute in this language:

> "Nor can the bill of interpleader be sustained upon general equitable grounds, in view of the jurisdictional restriction of the enactment herein discussed."

However, an examination of the entire opinion and authorities cited indicates that the holding is based wholly on the alleged failure to establish jurisdiction under the federal statute. It is confirmed that all of the essential elements of interpleader are present in the case, *i. e.*, (1) the existence of a stakeholder having in his possession money or property, which (2) is claimed adversely by others, and (3) in which he claims no interest. (See *Killian v. Ebbinghaus* (1884), 110 U. S. 568; *Groves v. Sentell* (1894), 153 U. S. 465; *Kingdom of Roumania v. Guaranty Trust Co. of N. Y.* (D. C. N. Y. 1917), 244 Fed. 195; *Pacific Mutual L. Ins. Co. v. Lusk* (D. C. La. 1930), 46 Fed. (2d) 505; *Conn. Gen L. Ins. Co. v. Yaw* (D. C. N. Y. 1931), 53 Fed. (2d) 684; *Zechariah Chafee, Jr,. Interpleader in the United States Courts* (1932), 41 Yale Law Journal 1134, 42 Yale Law Journal 41, at 54-56.)

In the case of *Turman Oil Company v. Lathrop* (1934), 8 Fed. Supp. 870, the complainant, a Delaware corporation, filed a bill in interpleader against various respondents, all residents of Oklahoma. The amount claimed by

the various respondents was $5,000. The district judge denied a motion to dismiss for want of jurisdiction, holding that diversity of citizenship existed between the complainant, a nonresident of Oklahoma, and the respondents, who were all residents of Oklahoma, and that a suit of a civil nature in equity was presented, between citizens of different states, and wherein the matter in controversy is in excess of $3,000, exclusive of interest and costs, within the purview of the Judicial Code, conferring original jurisdiction upon federal District Courts, and that it was unnecessary for a decision of the question there presented to consider the Federal Interpleader Act.

The following excerpt is quoted from the case of *Klaber v. Maryland Casualty Co.*, 69 Fed. (2d) 934, 939, also decided in 1934:

> "It is clear that, in order to invoke the enlarged powers granted to the United States District Courts by Congress with respect to certain bills of interpleader, the insurer must present a bill which not only contains the averments required by the statute, but which is sufficient under the principles of equity. *The act does not deprive the federal courts of any jurisdiction which they previously had over bills of interpleader, nor does it change the equitable principles governing such bills.* (Italics ours.) *Mutual Life Ins. Co. of N. Y. v. Bondurant* (C. C. A. 6), 27 F. (2d) 464; *National Fire Ins. Co. v. Sanders* (C. C. A. 5), 38 F. (2d) 212, 214; *Calloway v. Miles* (C. C. A. 6), *supra,* 30 F. (2d) 14. It merely provides that in certain cases and for the benefit of a class of disinterested stakeholders the courts may exercise powers that could not otherwise be exercised."

In *Mutual Life Ins. Co. v. Bondurant,* 27 Fed. (2d) 464, the Circuit Court of Appeals for the 6th Circuit held that the Interpleader Act did not effect any important change in the substantive rights of parties to an interpleader suit and that nothing in the langage or history of the act evidenced an intent that the rules as to costs and attorney's fees in a statutory interpleader should be different from those that prevail in the ordinary equity interpleader.

To the same effect that the Interpleader Act does not enlarge the equitable right of the interpleader, nor restrict it, is the decision in the case of

National Fire Ins. Co. v. Sanders, 38 Fed. (2d) 212.

In the case of *Penn Mut. L. Ins. Co. v. Meguire* (1936), 13 Fed. Supp. 967, a bill in interpleader was filed by an insurer, a citizen of Pennsylvania, against claimants to proceeds of a life policy, all residents of Kentucky.

At page 971, the court says:

> "The facts set up in the bill of complaint herein fully meet all the requirements of a bill of interpleader. They are not disputed. The plaintiff would not be a nominal party to any action instituted by any of the claimants to recover the proceeds of the policies, and is not a nominal party to this action. *Wilson v. Oswego Township,* 151 U. S. 56, 67, 14 S. Ct. 259, 38 L. ed. 70; *Massachusetts & Southern Construction Co. v. Cane Creek Township,* 155 U. S. 283, 286, 15 S. Ct. 91, 39 L. ed. 152.
>
> "Suits for interpleader in which actions in other courts were enjoined were familiar to equity when

the Constitution was adopted. *Spring v. South Carolina Insurance Co.,* 8 Wheat. 268, 5 L. ed. 614. Where the citizenship of the interpleader is in one state and the claimant in another, the federal court has jurisdiction. *Sanders v. Armour Fertilizer Works,* 292 U. S. 190, 191, 54 S. Ct. 677, 78 L. ed. 1206, 91 A. L. R. 950.

"The purpose of the interpleader statute was to give the stakeholder protection where adverse claimants resided in different states. The plaintiff in this case could have instituted the action in this court without statutory authority and could have obtained relief against the conflicting claims of the claimants, because all of them happen to be citizens of the commonwealth of Kentucky and the Western Judicial District, but if some of them had been citizen of another state, the plaintiff could not have gotten an acquittance from all of the claimants in a single action. *Sanders v. Armour Fertilizer Works, supra.*"

And further, at page 972:

"An action could not have been maintained by any of the claimants without making the insurance company a party. By interpleader, the risk of several actions being filed against it, or it being compelled to pay more than once the same obligation, is avoided. The chance of the insurance company being involved by conflicting claimants is too substantial for any court administering justice to hold it only a nominal party to such action.

"Under the principle of interpleader, the plaintiff, being a citizen of another state, had the right to institute the original action and pay the money into the registry of this court. The fund is in the possession of this court without objection from any of

the parties, and at the inception of the proceeding it had jurisdiction, and under such a state of facts may retain it."

The second main point in appellant's brief, namely, that the final decree was erroneous, raises no questions in addition to those raised by the first point.

Prof. Chafee in an article entitled "The Federal Interpleader Act of 1936" (45 Yale Law Journal, at page 1167), discusses the jurisdictional question arising when all the claimants are citizens of the same state, making the following statements:

> "When all the claimants are co-citizens, a bill against them cannot be maintained under the Act of 1936, because paragraph (a) (i) expressly requires that the interpleaded claimants be 'citizens of different States.' *However, a federal bill of interpleader may conceivably lie apart from the interpleader legislation embodied in subsection 26 of section 24 of the Judicial Code as amended by the Act of 1936. It may lie under the general equity powers of the district courts under subsection 1 of the same section of the Judicial Code* (36 Stat. 1091 (1911), 28 U. S. C. A. Sec. 41 (1) (1926), *if the amount in controversy be over $3,000.* (Italics ours.) Some cases before 1917 allowed a stakeholder residing in one state to interplead claimants all residing in another state,
>
> > (citing *Mutual L. Ins. Co. v. Farmers' & Mechanics' Nat. Bank,* 173 Fed. 390 (C. C. S. D. Ohio 1909); *Knickerbocker Trust Co. v. Kalamazoo,* 182 Fed. 865 (C. C. D. Mich. 1910). *Contra: Mutual L. Ins. Co. v. Allen,* 134 Mass. 389 (1883). See Chafee, *Interpleader in the United States Courts* (1932), 41 Yale L. J. 1134, at 1142-3).

although the authorities were divided. These cases would be in point if in the situation of the *Klaber* case (69 F. (2d) 934) all the claimants lived in one state and the casualty company was incorporated in another state. Federal interpleader might be desired by the company because of local prejudice or because the state courts imposed strict requisites upon interpleader, rendering that remedy impossible except in a United States court.

"The question at once arises whether the Act of 1936 is exclusive, abolishing all possibility of federal interpleader except when the stakeholder complies with the statutory requisite for relief. *Such was not the intention of the draftsman, and the language of the statute does not seem to necessitate such a result.* (Italics ours.)

"The 1926 Act was not considered by the courts to be exclusive. Thus an oil company incorporated in Delaware was allowed in 1934 to interplead several residents of Oklahoma as to the distribution of $5,000, part of the purchase price of oil and gas property. Kennamer, J., said: (*Turman Oil Co. v. Lathrop,* 8 F. Supp. 870 at 873)

> 'Interpleader suits have been maintained in the federal courts of equity from very early times. . . .
>
> 'Such an action involves two successive litigations; one between the plaintiff and the defendants as to whether the defendants shall interplead; the other between the different defendants on the conflicting claims. . . .

'In the instant case, the amount in controversy is $5,000; the suit is of a civil nature in equity, and plaintiff is a non-resident of the state of Oklahoma, and all of the defendants are residents of the state of Oklahoma, and are amenable to the jurisdiction of this court. No controversy is presented by one defendant against another defendant; the defendants and each of them are asserting their claims against the plaintiff; they are not making a claim that any of the other defendants owe them the commission they claim. Each of the defendants claiming to have acted as broker in the transaction are asserting a claim against the plaintiff for the $5,000 brokerage commission. . . . A controversy exists between plaintiff and the various defendants, who are claiming the sum of $5,000 due from plaintiff. As plaintiff has no claim to the fund, and has not incurred an independent liability to any of the claimants, but stands in the position of a disinterested stakeholder, it is entitled to the relief it seeks, and the determining as to which claimant is entitled to the fund is necessary for a final disposal of the case. A federal court of equity will complete the action, between residents of the same state, if jurisdiction has properly been conferred in the principal action. . . .

'In the instant case, the interpleader statute (of 1926) is not involved. . . .'

"This case is perhaps distinguishable on the ground that the 1926 Act applied only to insurance, casualty, and surety companies, and consequently an oil company, which did not fall within the scope of the interpleader legislation, was not subject to the statu-

tory requisites. It is certainly arguable that after 1926 an insurance company, casualty company, or surety company, that wanted to interplead could do so only under the interpleader statute and could no longer make use for this purpose of subsection (1) of section 24 of the Judicial Code, conferring general diversity jurisdiction. This argument would be applicable *a fortiori* to the Act of 1936, which allows every kind of person or corporation to have interpleader under statutory limitations; and it can therefore be urged that hereafter all federal interpleader must be brought in accordance with these limitations. However, there are several cases opposed to this argument. An Indiana casualty company was granted non-statutory interpleader in 1930 against two Louisiana clamiants, (*National Sash & Door Co., Inc. v. Continental Casualty Co.,* 37 F. (2d) 342 (C. C. A. 5th, 1930),) who could not have been interpleaded under the 1926 Act. In the *Klaber* case, which also involved a casualty company, Judge Sanborn considered at length the possibility of granting relief outside the provisions of the 1926 Act, and said (69 F. (2d) 943, at 939-940):

> 'The act does not deprive the federal courts of any jurisdiction which they previously had over bills of interpleader, nor does it change the equitable principles governing such bills. (Citations.) It merely provides that in certain cases and for the benefit of a class of disinterested stakeholders the courts may exercise powers that could not otherwise be exercised.
>
> 'It does not necessarily follow, however, that because the bill was not within the statute . . .,

> the appellants were entitled to a dismissal of the suit. The jurisdictional amount is involved and there is diversity of citizenship. Therefore, if the bill, although not one of statutory interpleader, may be sustained as a bill in the nature of a bill of interpleader, it should not be dismissed.'

"It would be unfortunate if the interpleader legislation should be held to abolish non-statutory federal interpleader. I am not sure whether an original bill should lie against claimants all residing in the same state, notwithstanding the reasoning on this point in the *Turman Oil* case, but ancillary bills have often been granted in such a situation and are very desirable. The new statute was drawn in the belief that the ancillary jurisdiction would continue to exist. The draftsman purposely refrained from attempting to define this jurisdiction in statutory terms, because such a definition would be sure to be both complicated and mistaken. The limits of ancillary interpleader are left to be worked out by the courts with reference to new situations that may arise.

"The Act of 1936, furthermore, expressly recognizes the possibility of federal interpleader bills that do not conform to the statutory requisites. Paragraph (e) allows a defendant at law to interplead defensively whenever an original or ancillary bill would lie under either the 1936 Act 'or any other provision of the Judicial Code and the rules of court made pursuant thereto.' This paragraph clearly contemplates that the new statute is not exhaustive. Federal bills of interpleader, apart from this statute, still seem

possible under the general diversity jurisdiction when $3,000 is involved and service can be obtained within the district of suit. But such non-statutory bills will be needed only in a few cases, because most interpleader situations will fall within the terms of the Act of 1936."

It is therefore respectfully submitted that the lower court did not abuse its discretion in denying appellants' motion to set aside default and decree based thereon and that the decree should be affirmed.

Respectfully submitted,

Lloyd S. Nix,
Solicitor for Appellees.